SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1626

GERTRUDE DONAHEY, TREASURER OF THE STATE OF OHIO, ET AL.,

Petitioners,

v.

PROTESTANTS AND OTHER AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, ET AL.,

Respondents.

MEMORANDUM FOR RESPONDENT

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MEMORANDUM FOR RESPONDENT

The Respondents, Protestants and Other Americans United for Separation of Church and State, (hereinafter referred to as "Americans United") respectfully respond to the petition for a writ of certiorari in this cause, waiving their right to file an opposing brief, and requesting that the Court grant certiorari, even though the United States Court of Appeals for the Sixth Circuit rightfully decided the matter below.

There is an important and clear-cut issue of law that is fundamental to the further conduct of the case and which would otherwise qualify as a basis for certiorari. Further, there are no non-constitutional issues raised by the opinion in the court below and the constitutional questions are before this Court at the appropriate time.

Important similar issues are already pending before this Court in other cases. These cases include *Earley v. DiCenso* (No. 569, October Term 1970); *Tilton v. Richardson* (No. 153, October Term 1970) and *Lemon v. Kurtzman* (No. 89 October Term 1970). In addition, *Americans United v. Independent School District,* decided November 19, 1969, is on appeal from the Supreme Court of Minnesota to this Court (No. 934, October Term 1970) and *Board of Education of the College of Kanawha v. Hughes* (No. 517, October Term 1970) is on appeal from further Supreme Court Appeals of the State of West Virginia. Also pending, by the filing of a jurisdictional statement or request for certiorari, are *Kervick v. Clayton,* (No. 852, October Term 1970) on appeal from the Supreme Court of New Jersey, *Williams v. Seegers,* (No. 1508, October Term 1970) on appeal from the Supreme Court of Louisiana and *Sanders v. Johnson,* (No. 1624, October Term 1970) on appeal from the United States District Court for the District of Connecticut.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 435 F.2d 627 (1970). The opinion rendered by the District Court for the Southern District of Ohio, Western Division, is not reported. Both opinions appear in the Appendix filed with the Petition for Certiorari.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on December 16, 1970. Petitioners submitted an application for extension of time in which to file their petition for a Writ of Certiorari to the Honorable Potter S. Stewart, Circuit Justice for the Sixth Circuit. On March 5, 1971, Justice Stewart ordered that the time for filing a Petition for Writ of Certiorari be extended to and including April 26, 1971. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Does Title II of the Elementary and Secondary Education Act of 1965, which authorized federal grants of library and instructional materials to church schools, contravene the establishment clause of the First Amendment by furnishing, at taxpayer expense, libraries to secretarian schools?

2. Does the lending of library books and materials by the government directly to parochial schools, rather than the issuance of textbooks to school children, involve the state and the church in an excessive entanglement and constitute a form of state aid distinguishable from the loans to children approved in *Board of Education v. Allen*, 392 U.S. 236 (1968)?

STATUTORY PROVISIONS INVOLVED

Respondents brought this action to have Title II of the Elementary and Secondary Education Act of 1965, Public Law 89-10, 79 Stat. 36, 20 U.S.C. §§ 821-827, declared violative of the First and Fourteenth Amendments to the United States Constitution insofar as it authorizes grants of library and other facilities directly to church schools. The full text of the Act is set forth in the Petition for Certiorari. The complaint was filed in the United States District Court for the Southern District of Ohio, Western Division, on June 10, 1966 to test the constitutionality of Title II

of the Elementary and Secondary Education Act (supra) alleging a violation of the First and Fourteenth Amendments of the United States Constitution. Title II of the ESEA provides that the United States and the State of Ohio furnish, among other things, school libraries to private, elementary and secondary, church schools.

Respondents contend that the Court below was correct in distinguishing a situation where libraries are furnished to church schools from situations where textbooks are furnished to all students including those who attend church schools. The latter practice was held proper in *Allen* (supra). The court below pointed out: "Allen followed Everson v. Board of Educ., 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed 711 (1947), which upheld the constitutionality of a state statute providing for the free busing of school children to public as well as parochial schools.

In both of these cases the secular aid was furnished directly to the school children, who ought to be entitled to such aid irrespective of the schools they attended, whether public or parochial, the same as they are entitled to other public services such as police and fire protection, sewage facilities, streets and sidewalks." (Slip Opinion p. 3)

REASONS FOR GRANTING THE WRIT

Respondents represent that the question of the extent to which the state or federal government may aid churches and their schools is one of grave constitutional importance and that clarification will serve not only for the guidance of the lower courts in this case, but for the guidance of state legislatures, public school boards, and private church school officials throughout the nation.

Chief Justice Burger in *Walz v. The Tax Commission*, 397 U.S. 664 (1970), pointed out that the drawing of fine distinctions is one of the functions of a court when confronted with a church-state litigation. Petitioners stated that "one has to resort to 'splitting hairs' in order to find any difference between the assistance provided under Title II of the ESEA and that provided in *Allen* (supra)." (Brief p. 10)

Respondents agree that a distinction must be made, but the making of distinctions is of the essence of law. In *Allen,* textbooks were provided to pupils for their own use in accredited church-related schools. Unter Title II, whole libraries are provided to church-related schools. It really is not a matter of "splitting hairs" to differentiate between a government program which lends textbooks to children, no matter what school they attend, from a government program which furnishes library resources "which for the purpose of this subchapter means books, periodicals, documents, audio-visual materials and other library materials" (§ 823 (a)(2), the Act) to church schools.

Those who urge the government to finance church schools could not find a better way to start than to have the taxpayer pick up the tab for libraries. These certainly are *instructional* in their impact and an integral part of any educational system. The furnishing of libraries to church schools will aid religion. If the task is performed by a government in order to perform some educational service of its own, there results the unconstitutional use of a church as an agent to carry out a state purpose. It will not be a service performed for children, because they are children, but one for schools because they are schools. The result will be either direct government aid to religion, or a powerful hindrance to religion. Many believe that the latter will be the actual result despite the optimism of the proponents.

CONCLUSION

It is respectfully suggested that the Writ be granted. Respondents have indeed presented a factual attack upon the legislation which, to the extent complained of, can be found unconstitutional by its very wording. This presents a substantial question of federal constitutional law which can be finally determined by this Court.

Respectfully submitted,

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CERTIORARI DENIED N.C.R.